IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.99 OF 1992

1. Smt. Kausalyabai w/o. Maniram Gaikwad

2. Shri Yashwant Maniram Gaikwad

3. Shri Madhukar Maniram Gaikwad ..Appellants
(Orig. Plaintiffs)

Versus

Shri Baburao Shivaji Ugale
deceased by heir :-

1. Smt.Renubai w/o. Baburao Ugale
since deceased by her heirs

1A. Ramdas Radhakrishna Ugale,

1B. Smt. Yashodabai Radhakrishna Ugale,

1C. Shivnath Vithal Ugale

1D. Ganpat Vithal Ugale,

(I) Smt. Shantabai Ganpat Ugale

(II) Shri Chandrakant Ganpat Ugale

(III) Shri Pravin Ganpat Ugale

(IV) Shri Milind Ganpat Ugale

1E. Madhukar Vithal Ugale .. Respondents
(Orig. Defendants)

Mr.G.R.Agarwal, Advocate for the Appellants

Mr. Vinod Jadhav & A.R. Kapadnis Advocate for the Respondents.

CORAM : S.R. SATHE,J.
DATED : 25/07/2007

ORAL JUDGEMENT :-

1. The appellants-original Plaintiffs in Regular Civil Suit No.88 of 1963 have preferred this appeal against the judgement and order passed by the Court of Second Additional Judge, Nashik in Civil Appeal No.143 of 1981 whereby the order passed by the Trial Court dismissing the Plaintiff's suit for possession was confirmed and appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'Defendants'.

2. The brief facts giving rise to this appeal are as under :-

The house property bearing CTS No.4320 situated at Nashik was owned by Shivram Dagdu Sali. According to Plaintiffs, Maniram Rama Gaikwad i.e. husband of Plaintiff No.1 and father of Plaintiff Nos. 2 and 3 purchased the said property by registered sale deed dated 19/06/1940 for Rs.200/- and since then Plaintiffs were in possession of the same. The husband of Plaintiff No.1 namely Maniram died on 01/01/1958. The original defendant Baburao Shivaji Ugale is the brother of Maniram's wife. He was in difficulty in having accommodation for residence. He, therefore, requested Plaintiffs to give suit property for his occupation.

Considering the relations, Plaintiffs gave the suit property to original defendant Baburao Shivaji Ugale as a Licensee. However, in the year 1960, Plaintiffs found that defendant was to dispose of the said property. Hence, Plaintiffs issued public notice in daily newspaper 'Gavkari' on 16/06/1960 stating therein that Plaintiffs are owners of the said property. The defendant gave reply to the said notice on 28/09/1960 and denied the ownership of Plaintiffs and on the contrary, contended that he is the owner of the said property. Plaintiff, therefore, issued notice dated 04/11/1960 to defendant Baburao Ugale and revoked his license and called upon him to hand over the possession of the suit property. As the defendant did not hand over the possession, Plaintiff filed suit for possession of the suit property on 16/02/1963.

3. The defendant filed his Written Statement at Exh-9 and opposed the suit claim. He admitted the relation between the parties. He further contended that Plaintiffs were not at all concerned with the suit property and the suit property was all along in his possession as a owner. He also denied that he is the licensee of the Plaintiffs. According to him, as he was addicted to drinking and there was charge of loan of

Shivram Dagdu on the said property, the defendant paid Rs.200/- but apprehending that if the said house remains in the name of defendants Creditors would attach the same, as per the advice of his wife he purchased the suit property in the name of Maniram Gaikwad i.e. husband of Plaintiff No.1 on 19/07/1940. However, Maniram did not to get any ownership right in the said property and it was only Benami transaction. According to defendant, since the year 1940 all along he paid the municipal taxes of the suit property, carried out repairs, inducted tenants in the same and also recovered rent. During the life time of Maniram, he never obstructed defendant to reside in the suit property or to carry out repairs and construction etc. in the suit property. Not only that but in the year 1951 defendant and his brother Vithal Buwaji mortgaged some northern portion of the suit house to one Kashinath Tambe but at that time, also Plaintiff did not raise any objection. However, subsequently taking advantage of the fact that suit property was standing in the name of Maniram, Plaintiffs filed the present suit. The defendant also alternatively contended that he is in possession of the suit property for more than 12 years openly, peaceably and continuously and as such, he has became the owner by adverse possession.

The defendant also contended that the suit is barred by law of limitation. Hence, on all these grounds he prayed for the dismissal of the suit.

4. On these pleadings, the learned Trial Judge framed issues at Exh-11. In order to prove their respective cases both the parties adduced oral and documentary evidence. After considering the said evidence the learned Trial Judge came to the conclusion that defendant has failed to prove that he was the real owner of the property and same was purchased in the name of Maniram i.e husband of Plaintiff No.1 as defendant's Benamidar. The Trial Court also held that Plaintiffs have failed to prove that the defendant is in occupation of the suit property as Plaintiff's licensee. On the contrary, the Trial Court held that the original defendant is in possession of the suit property right from the year 1940 and he has acquired title by adverse possession. Besides this, the Trial Court also found that the suit filed by the Plaintiff was barred by law of Limitation. Hence, on all these grounds the Trial Court dismissed the Plaintiff's suit for possession.

5. Being aggrieved by the above mentioned order

Plaintiffs filed Civil Appeal No.143 of 1981. However, the same also came to be dismissed. Hence, Plaintiffs filed the present Second Appeal.

6. From the perusal of the record it appears that while admitting the appeal this Court (CORAM : H.H. Kantharia, J.) has passed following order :-

> "Admit.
>
> Substantial question of law involved as framed in grounds c to f."
>
> *The said grounds are as under :-*
>
> *" c) That the substantial question of law would be as to where the inconsistent and incompatible pleas taken by the Defendants in the written statement are impermissible in law, and whether the courts below were right in ignoring the one and holding that the Defendants had perfected title by adverse possession.*
>
> *d) That the substantial question of law would be when the courts below have held that the Defendants failed to prove their title and also the plea of Benami whether in the facts and circumstances of the*

case, it was permissible to hold that the Defendants had perfected title by adverse possession.

e) That the substantial question of law would be whether in the facts and circumstances of the case, it could be stated that the Defendants have perfected the title by adverse possession satisfying the three ingredients, namely, (i) animus to claim hostile title, (ii) admitting that the title is for somebody else and that such claim should be hostile one and in view of the defence taken by the Defendants whether it could be said that the Defendants have perfected the title by adverse possession.

f) That the substantial question of law would be when the Defendants were claiming themselves to be the true owners from its inception and deceased Maniram is Benamindar and in the light of this impression carried by them, it is respectfully submitted that there was hardly any scope to contend that they

have now perfected the title by adverse possession."

7. In this appeal before me Shri G.R. Agarwal, learned Advocate for the Appellants-Plaintiffs has urged three points. Firstly, he submitted that defendant No.1 had in fact taken a stand that suit property was purchased by him in the name of husband of Plaintiff No.1 by him and thus, he (Maniram) was his Benamidar. At the same time, he took the contention that he has became owner by adverse possession. Thus, though inconsistent pleas were taken by the defendant the Courts below held that defendant has perfected title by adverse possession and that was not permissible in law. Secondly, he canvassed before me that in the instant case essential ingredients of adverse possession are not satisfied and defendant had no animus to claim hostile title and as such the finding recorded by the Courts below that defendant has perfected the title by adverse possession is not correct. Lastly, he submitted that the Courts below ought to have held that Plaintiffs have proved that Maniram purchased the suit property in the year 1940 and the defendant has failed to prove that it was benami transaction and as such, decree for possession

on the basis of Plaintiff's title should have been passed. He, therefore, submitted that the appeal be allowed and decree for possession against the defendant be passed. As against this, learned Advocate for the Respondent supported the judgement and order passed by the Courts below. He submitted that though inconsistent pleas were taken, ultimately, defendant led evidence to show that he has became owner by adverse possession and under the circumstances, the Courts rightly held that defendant has perfected his title by adverse possession and Plaintiffs have failed to file suit for possession within 12 years from their Sale Deed and hence, it was rightly held as barred by limitation. He, therefore, submitted that appeal be dismissed.

8. It is not in dispute that the suit property bearing CTS No.4320 described in detail in para-1 of the plaint was initially owned by the defendant Baburao Shivaji and his brother Vithal Shivaji. Admittedly, Baburao Shivaji and Vithal Shivaji sold the suit house to Shivram Dharankar on 31/10/1916 and then on 19/07/1940 Shivram sold the suit property to Maniram i.e. husband of Plaintiff No.1. It is the case of Plaintiff that Maniram acquired title to the suit property by virtue of Sale Deed dated 19/07/1940 as

against this, the original defendant took the contention that the said property was in fact purchased by him but in the name of Maniram. According to him, as he was addicted to drinking with a view to save the property from the creditors the Sale Deed was executed in the name of Maniram who was the husband of the defendant's sister. However, from the evidence on record it is crystal clear that the original defendant failed to adduce any evidence to show that the said property was purchased by him but only in the name of Maniram and that it was Benami transaction. It is true that the defendant also took the contention that he has became the owner of the suit property by virtue of adverse possession. Apparently, this contention appears to be inconsistent with the other contention of the defendant namely that he purchased the suit property in the name of Benamidar i.e. Maniram. However, it is well settled that party can take inconsistent pleas and alternate pleas but when there are such pleas then the party must elect either of it.

9. In the instant case, as the Sale Deed of the suit property is admittedly in the name of the defendant, husband of Plaintiff No.1, it seems that defendant took plea of benami transaction. However, as

admittedly, he was in possession of the suit property even on the date of the Sale Deed and he also continued to remain in possession by way of adverse possession, he contended that he has become the owner by adverse possession. So, ultimately the Plaintiff's suit is mainly dismissed on the grounds that the defendant has perfected his title by adverse possession.

10. The main question which therefore falls for my consideration is whether in the instant case the defendant has proved that he has acquired title by adverse possession. It is well settled that adverse possession means, possession by a person holding the land on his own behalf or on behalf of some person other than the true owner having a right to immediate possession, provided the true owner is not under a disability or incapable of suing. Adverse possession is a possession that is hostile, under a claim or colour of title, actual, open, notorious, exclusive, and continuous, for the required period of time i.e. 12 years, thereby giving an indefeasible right of possession or ownership to the possessor by the operation of the limitation of action. So, bearing in mind the above mentioned requirements of adverse possession, we have to scan the evidence on record and

find out whether the original defendant has perfected his title by adverse possession.

11. From the perusal of Exh-50 the registered sale deed dated 19/07/1940, it is clear that Maniram purchased the suit property from Shivram Dagdu. Though, it is mentioned in the Sale Deed that possession is given to Maniram, there is abundant evidence on record to show that actual possession was not at all given by Shivram. In fact, it is clear from the evidence on record that even since the year 1940 original defendant Baburao Shivaji and after him his heirs are in continuous possession of the suit property. Not only that but there is sufficient evidence to show that Baburao Shivaji was treating the said property as owned by him and was not accepting Maniram as the real owner. He was denying title of the real owner. Though the Sale Deed was standing in the name of Maniram, it has come on record that during all these long years the defendant has paid taxes of the suit property. Not only that but he carried out major repairs and even additional construction in the suit property. He inducted tenants in the suit property and recovered rents from them. Admittedly, at no point of time Maniram or his heirs obstructed the defendant in doing

the above mentioned acts. It must be noted that this is not a case where the original owner Maniram in whose favour sale deed of the property stood or his legal heirs were not knowing that defendant is treating himself as the owner of the suit property. Admittedly, there is relation between plaintiff and Maniram with the defendants. Maniram and defendants are both residing in the same locality. So, this is not a case where it can be said that Maniram or Plaintiffs were not aware about the defendants actions or his conduct by virtue of which original defendant was treating himself as the owner of the suit property by denying ownership of Maniram and Plaintiffs.

12. It is significant to note that defendant was not only in continuous open possession of the suit property but he had even mortgaged some portion of the suit property in the year 1951 to one Kashinath. Even at that time also real owners of the suit property did not raise any objection. It seems that it is only when defendant tried to dispose of property in the year 1960. Plaintiffs issued public notice. But till that time the defendant No.1 had in fact perfected his title because he had remained in open, continuous, uninterrupted possession of the suit property by

denying title of Plaintiffs for a period of about 20 years.

13. Shri G.R. Agarwal learned Advocate for the Appellant-Plaintiffs has relied on several authorities to substantiate his proposition that defendant has failed to prove the essential requirements of adverse possession. He has placed reliance on :

1. 2004(5) ALL MR(SC)432 VASANTIBEN PRALHADJI NAYAK V/S.SOMNATH MULJIBHAI NAYAK

2. 2002 AIR SCW 730 KONDA LAKSHMAN BAPUJI V/S. GOVT. OF ANDHRA PRADESH AND ORS.

3. 2002 AIR SCW 201 DARSHAN SINGH AND OTHERS V/S. GUJJAR SINGH.

4. AIR 1964 SC 1254 (V 51 C.S.M. KARIM V/S. BIBI SAKINA

5. 2003 (1) ALL MR 565 BHIMRAO DNYANOBA PATIL AND ORS. V/S. STATE OF MAHARASHTRA AND ORS.

6. 1977 MAH. L.J. 130 YESU SADHU NIMAGRE & ORS. V/S. KUNDALIKA BABAJI NIMAGRE AND ORS.

7. 1977 MAH.L.J. 485 RAJARAM SOMA MALI V/S. KARTIK MOTIRAM DESHMUKH

8. 2004 (3) ALL MR 645 DR. S.P. BHUGUL V/S. W.N. CHARHAT

9. S.A. NO.586/1982 K.T. BEDMUTHA V/S. H.D. BAGRECHA

14. In all these authorities the Courts have observed as to what a party is supposed to prove when title by adverse possession is claimed. Naturally, the proposition in the above mentioned authorities are not disputed and can not be disputed. By relying on some of the above mentioned authorities it was tried to be argued on behalf of the Plaintiffs that in the instant case the adverse possession is not specifically pleaded and as such, defendant's evidence in that behalf can not be considered. However, from the perusal of the Written Statement and in particular the last paragraph we do find that the defendant has taken alternate contention of adverse possession. So, it can not be said that there were no pleadings regarding adverse possession. Not only that but we find that defendant has also adduced cogent and convincing evidence to show that as to how he was continuously in possession of the suit property right from the year 1940 and how he was treating himself as the owner of the said property and doing certain acts in respect of the said property. So, it has to be held that both the Courts below after considering the entire evidence in its proper

perspective have recorded concurrent finding of fact that the original defendant has proved that he has perfected his title by adverse possession.

15. Both the Courts below have held that Plaintiffs have not filed the suit within 12 years when the possession of the defendant became adverse to Plaintiff. However, attempt was made on behalf of the Plaintiffs to show that in the year 1960 or thereabout when the defendant made an attempt to get his name entered to the suit property Plaintiffs objected for the same. So, that was the first time when defendant indicated his intention of holding property adversely or it was the first time when the possession of the defendant became adverse to Plaintiff. However, we can not ignore the fact that the defendant is in actual possession right from the year 1940. The Plaintiffs have miserably failed to prove that it was permissive possession or the said possession was as a licensee. There is also no convincing evidence to show that Plaintiffs allowed the defendants to remain in possession he being relative of the Plaintiff. When a person carries out some construction in the property which is standing in the name of other person then this certainly amounts to an act of showing adverse

possession. Not only that here the defendant has in fact recovered rent from the tenants in the suit property. So, it can not be said that defendant's possession became adverse for the first time in 1960 or thereabout when he made an attempt to get his name entered to the suit property. In fact, we find that it is only because Plaintiff issued public notice, the defendant moved an application for getting his name entered. So, considering this aspect both the Courts below rightly held that the suit for possession filed by the Plaintiff on the basis of title is barred by law of limitation.

16. Thus, from the above discussions it is clear that there is no substance in the present appeal. Hence, I pass the following order :-

O R D E R

Appeal is dismissed.

Under the circumstances of the case Parties to bear their own costs.

(S.R. SATHE,J.)